Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications	)	**WC Docket No. 02-148**
International, Inc.	)	
	)	
Consolidated Application for Authority	)	
To Provide In-Region, InterLATA Services in	)	
Colorado, Idaho, Iowa, Nebraska	)	
And North Dakota	)	

REPLY OF TOUCH AMERICA, INC.

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July 29, 2002

Table of Contents

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REPLY OF TOUCH AMERICA, INC.

Pursuant to the Public Notice issued in the above-referenced proceeding, Touch America, Inc. ("Touch America") hereby replies to the initial comments filed in response to the Consolidated Application ("Application") of Qwest Communications International, Inc. ("Qwest") for authority to provide in-region, interLATA services in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota.

I. INTRODUCTION AND SUMMARY

As described in the initial comments in this proceeding, Qwest has not only failed to meet the requirements of the Telecommunications Act ("Act"), but has shown itself to be so cavalier with the law and its competitors, that its Application must be denied. Qwest's announcement yesterday that it had incorrectly applied its accounting policies to certain optical capacity and equipment transactions during 1999 through 2001, thereby possibly requiring revenue adjustments of up to $1.16 billion, has a significant impact on this proceeding that must not be ignored by the Commission. Through its announcement, Qwest all but admits that its "lit capacity IRU" agreements are service contracts, not the "asset sales" of facilities that Qwest has

purported to hold them out to be and, therefore, that Qwest, in fact, has been providing in-region, interLATA services through such agreements. Qwest should not be rewarded for such conduct by granting it the authority it seeks under the very statute that it has just admitted to have been violating all along.

Further, as the comments demonstrate, inordinately high UNE rates coupled with Qwest's anticompetitive activities have resulted in a paucity of competitive commercial local exchange activity in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota. Given this lack of commercial activity, Touch America's two-year history with Qwest is particularly telling of the manner in which Qwest will conduct its activities outside of the "test" environment – the only environment existing today. As set forth in Touch America's initial comments, Touch America's experience makes clear that the Application must be denied. Indeed, the initial filings demonstrate that Touch America's experience with Qwest is being borne out in the local exchange market as Qwest, among other things, is precluding competitive local exchange carriers ("CLECs") from access to the information and systems that they need to serve their customers and delivering to CLECs wholly inaccurate and inadequate wholesale bills. Qwest has failed to demonstrate in any meaningful way that it has met the requirements of the Act.

Moreover, the litany of anticompetitive and unlawful conduct by Qwest mandates denial of the Application. Qwest's efforts to silence its critics and provide itself with an unlawful "jump-start" in the long distance market cannot be tolerated. Continued oversight and enforcement of Qwest will not rein in Qwest's predilection to skirt the law and its obligations to competitors. Qwest must be made to comply with the law now, not after it receives 271 authority. Indeed, if it approves this Application, the Commission may establish a new standard of "271-lite"; – *i.e.*, just how little a Bell Operating Company ("BOC") must show, and how

much the Commission is willing to overlook, in granting 271 authority. At a minimum, the Commission must require Qwest to divest itself of its in-region, interLATA assets prior to permitting Qwest into the long distance markets, and require Qwest to submit to a genuinely independent and comprehensive audit for the purpose of ensuring Qwest's proper divestiture of such assets.

II. ARGUMENT

A. By its announcement that it has incorrectly applied its accounting policies with respect to certain of its IRU transactions, Qwest has all but admitted that it has been violating section 271 and the Application must therefore be denied.

As set forth in the initial comments in this proceeding and Touch America's complaints pending before the Commission,[1] Qwest has been violating section 271 through its so-called "lit capacity IRU" agreements.[2] In response, Qwest has claimed that its "lit capacity IRU" agreements are asset sales (*i.e.*, a sale of facilities), not leases of telecommunications services. As explained below, although Qwest's invocation of the term "IRU" is nothing more than a red-herring intended to obfuscate its clear statutory violation, Qwest's announcement that it has improperly accounted for these types of transactions is an admission by Qwest that even its "IRU" scheme has finally been uncovered. By its own admission, Qwest has clearly been violating section 271 of the Act.

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[1] *See* File No. EB-02-MD-003 (alleging Qwest's sale of "Capacity IRUs" are in essence long-distance voice and data telecommunications services that specifically violate section 271) ("*IRU Complaint*") and File No. EB-02-MD-004 (challenging Qwest's compliance with FCC Merger and Divestiture Orders and alleging Qwest has violated or is presently violating sections 201, 202 and section 271 of the Telecommunications Act of 1996, by engaging in unreasonable and discriminatory activities and failing to fully divest its long-distance business and cease providing in-region long distance services) ("*Divestiture Complaint*").

[2] *See also* Comments of AT&T Corp. ("AT&T Comments") at 125-29; Comments of the Competitive Telecommunications Association ("CompTel Comments") at 7-12.

Over the past several years, in an effort to conceal its provision of prohibited, in-region, interLATA services, Qwest contrived the idea of a "lit capacity IRU." However, pursuant to its "lit capacity IRU" agreements, Qwest merely provides "transmission." Whether Qwest designates the transmission as an "IRU" is irrelevant. The Act defines prohibited in-region, "interLATA services" as "telecommunications"[3] which, in turn, is defined as "transmission … of the user's choosing.[4] Because Qwest is selling "transmission" through its "IRU Agreements," Qwest is providing a telecommunications service irrespective of whether Qwest refers to it as an IRU or a facility. In other words, Qwest's argument is merely an attempt to divert attention from the plain language and meaning of the statute.

In fact, its own cleverness has finally caught up with Qwest. Assuming, *arguendo*, that Qwest's IRU argument is relevant, Qwest has now reversed field, admitting that capacity may have been improperly booked as IRUs when it should have been booked as services.[5] In its *IRU Announcement*, Qwest discloses that it has "in some cases applied its accounting policies incorrectly with respect to certain optical capacity asset sale transactions in 1999, 2000 and 2001."[6] More particularly, Qwest admits that, in some instances, the "optical capacity asset sales" should have been "instead treated as operating leases or services contracts."[7] Thus, caught between the Securities and Exchange Commission and this Commission, Qwest had no choice but to admit that its so-called "lit capacity IRUs" are not facilities but, are, in fact, services.

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[3] 47 U.S.C. § 153 (21).
[4] 47 U.S.C. § 153 (43).
[5] *See* "Qwest Communications Provides Current Status of Ongoing Analysis of its Accounting Policies and Practices," July 28, 2002, www.qwest.com/about/media/pressroom ("*IRU Announcement*").
[6] *See IRU Announcement* at 1. Qwest made clear that the analysis of its accounting policies and practices include those with respect to revenue recognition of sales of optical capacity assets *(i.e.*, IRUs). *Id*.
[7] *IRU Announcement* at 2.

Qwest's "IRU" scheme no longer provides it cover and, with nowhere left to hide, Qwest now effectively admits that it has been providing in-region, interLATA services. In short, Qwest has been providing "transmission" services all along, in violation of section 271 of the Act.

There is therefore no doubt that Qwest has been violating section 271 for at least two years. Qwest should be stopped in its tracks and forced to account for its lawlessness, not given a free pass into the long distance marketplace. As CompTel states in its initial comments in this proceeding, "[i]t would certainly undermine Congressional intent to allow Qwest to reap the benefits of Section 271 without fully complying with the restrictions imposed by the statute."[8]

Inaction by the Commission in this proceeding with respect to Qwest's in-region, interLATA activity will also effectively set bad precedent for other BOCs who are watching the proceeding and likewise chomping at the bit to get into the long distance market.[9] Giving a wink and nod to the BOCs in this regard is clearly contrary to the statute and the public interest. The Commission must require Qwest to fully divest itself of its in-region, interLATA assets and customers before allowing Qwest to properly enter the in-region, interLATA market. In addition, given Qwest's inclination to elude divestiture requirements, the Commission must require a genuine and comprehensive "independent" audit of the corrective actions Qwest takes to rightfully divest its in-region, interLATA assets.

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[8] CompTel Comments at 12.

[9] *See, e.g., id*. at 12 (indicating that the Commission's inaction will doubtlessly encourage other BOCs to also ignore the interLATA restrictions imposed by the Act prior to obtaining Section 271 approval).

Touch America notes that it is of no relevance that the in-region, interLATA services are being offered by Qwest's 272 affiliate, Qwest Communications Corp. ("QCC"). Section 271(a) of the Act explicitly provides that "[n]either a Bell operating company, *nor any affiliate of a Bell operating company*, may provide interLATA services except as provided in this section."[10] Consequently, neither Qwest nor QCC is permitted to offer in-region, interLATA services without first receiving authority from the Commission. Either way, Qwest is in violation of section 271.

Moreover, Qwest is under investigation by the Securities and Exchange Commission and is subject to a criminal inquiry by the DoJ with respect to the manner in which Qwest accounted for sales of IRUs. In light of these investigations, and particularly in view of the fact that the Chairman of the Commission has been appointed to serve on the new interagency Corporate Fraud Task Force created by President Bush, the Commission should be very wary of giving the "go ahead" to Qwest – one of the companies whose duplicitous activities has resulted in the formation of the Task Force. As the "lit capacity IRU" sales are at the heart of Touch America's and other competitors' allegations in this proceeding, the Commission should be reluctant to turn a blind eye to these arguments in this proceeding, while holding itself out as a voice of corporate responsibility and accountability. In sum, Qwest's newly-revealed information as to nature of its "lit capacity IRU" Agreements compels denial of the Application.

[10] 47 U.S.C. § 271(a) (emphasis added).

B. The filings in this proceeding clearly demonstrate that the absence of any commercial testing of Qwest's OSS and Touch America's "real life" experience with Qwest compels a finding that the Application must be denied.

The initial comments in this proceeding demonstrate that inflated UNE rates and Qwest's reluctance to meet its obligations under the Act have resulted in a dearth of competitive commercial activity in the Qwest region.[11] As illustrated by WorldCom, assuming that Qwest's data is correct, in May 2002, Qwest processed at most 6,000 UNE-P orders via its EDI ordering interface, as compared to other BOC regions, where WorldCom alone often submits 3,000-5,000 UNE-P orders *per day* in individual states.[12] Although Qwest has clearly inflated the data supporting its Application,[13] even the 112,000 stand-alone loops that Qwest claims to have provisioned throughout the 5-state region[14] pales in comparison to the 164,000 stand-alone loops that Verizon had in place a year ago in the State of Pennsylvania alone to support its 271 application,[15] and even the 80,000 loops that BellSouth had provisioned in the State of Georgia at the time it filed its application for that state.[16]

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[11] *See* Comments of WorldCom, Inc. ("WorldCom Comments") at 2-3 (explaining how Qwest's over-inflated UNE rates and OSS deficiencies delayed WorldCom's entry into the Qwest region); AT&T Comments at 133-138 (describing how Qwest's UNE rates preclude competitive entry in certain states, such that the current level of UNE-based competition for residential service in Idaho and North Dakota is less than 1 percent of the levels of UNE-based residential competition that existed in Massachusetts, New York and Pennsylvania at the time the Commission considered 271 applications in those states); Comments of Integra Telecom of North Dakota, Inc. at 7-8 (demonstrating the lack of local competition in North Dakota).

[12] WorldCom Comments at 1-2.

[13] *See* Comments of Sprint Communications Company L.P. at 11-13 (although Sprint has withdrawn from the local voice market and has no stand-alone UNE loops, Qwest nevertheless attributes over 68,000 competitive access lines to Sprint in the five states).

[14] Qwest's Application at 57.

[15] *See In the Matter of Application of Verizon Pennsylvania, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd. 17419, 17462 (2001).

[16] *See In the Matter of Joint Application by BellSouth Corporation for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd. 9018, 9144 (2002) ("*Georgia/Louisiana Order*").

As explained by WorldCom, Qwest relies primarily on third-party testing of its OSS.[17] Given the absence of any real commercial testing of Qwest's OSS in connection with Qwest's Application, Touch America's two-year history with Qwest is particularly telling of how Qwest will conduct itself outside of the test environment. Touch America's experience, which unfortunately is being borne out by the CLECs in their limited commercial activity in the Qwest region, compels the denial of Qwest's Application.

As detailed more fully in Touch America's initial comments and its *Divestiture* and *IRU Complaints* pending before the Commission, Qwest has continually abrogated its obligations to Touch America and obstructed Touch America's efforts to serve its customers in an effort to place itself in a superior position once it obtains 271 authority. Among many other things, Qwest denies Touch America access to the databases and systems it needs to serve its customers and fails to provide accurate or complete information to Touch America.[18] Qwest's actions to wrongfully limit Touch America's access to databases and information, prevents Touch America from providing even the most basic customer care to its customers.[19]

Qwest has also provided Touch America inaccurate and wholly inadequate bills. Qwest's bills grossly overstate costs and fail to provide industry-standard billing detail, thereby foreclosing Touch America from effectively verifying its costs and revenues and forcing Touch America, at its cost, to engage an independent consulting firm to sort out Qwest's bills.[20]

Touch America's experience is indicative of the conduct that competitors can expect once they enter the market and really begin to compete against Qwest and is therefore relevant to the

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[17] WorldCom Comments at 1-3.

[18] *See, e.g.*, Affidavit of Carol Giamona ("Giamona Affidavit") (filed with the Commission in connection with Touch America's *Divestiture Complaint*, File No. EB-02-MD-004).

[19] *Id*.

Commission's analysis. Indeed, the Commission has previously assessed a BOC's relative performance towards CLECs and interexchange carriers ("IXCs") in assessing 271 applications. In approving Verizon's 271 application for the State of New York, the Commission, acknowledging that "the provisioning of [competitive LEC] trunks is most like the provisioning of trunks for interexchange carriers," found that Verizon was providing nondiscriminatory interconnection trunking in New York because Verizon "missed installation appointments for local exchange competitors less often than it did for interexchange carriers . . . ".[21] The Commission also found that there was "no significant difference between [Verizon's] provisioning for interconnection trunks to local competitors and to interexchange carriers."[22] That is, the Commission looked to the IXC's experience with the BOC to assess the BOC's performance in the local exchange marketplace. Likewise, the Commission must consider Touch America's experience with Qwest in assessing Qwest's performance in the local exchange marketplace.

Further, since the filing of the very first 271 applications, the Commission has undertaken an analysis of the effect of the entry of the applicable BOC into the long distance market on competition in the long distance markets.[23] The Commission has found that, in order for the

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[20] *Id*.

[21] *See In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953, 3980-82 (1999) ("*New York Order*").

[22] *Id*. at ¶ 3983. *See also Application of Verizon New England Inc For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd. 8988, 9094-95 (2001) ("Verizon's [interconnection] provisioning performance for competitors in Massachusetts was as good as that provided to interexchange carriers" and "Verizon's installation performance for competitors was as good or better than that provided to interexchange carriers.")

[23] *See In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, CC

benefits of competition in the long distance markets to come to fruition, "local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market."[24] Put another way, "[a]bsent checklist compliance, grant of section 271 authority could potentially harm the long distance market because the BOC would have a unique ability to introduce vertical service packages (*i.e*., long distance and other telecommunications services bundled with local exchange service)."[25] In fact, this was recently recognized by the Montana Public Service Commission:

> [a]s for [Touch America's] complaint, this 271 docket is not strictly about local competition. The FCC is clear that public interest considerations are not limited to just local market conditions but also include long distance market considerations. Qwest plans to bundle local and long distance services. The Commission looks forward to the FCC's and the court's findings on the appropriateness of Qwest's actions.[26]

As discussed below, the initial comments in this proceeding demonstrate that CLECs operating in the Qwest region – albeit on a limited commercial basis – are experiencing the same types of problems, particularly those related to billing and access to Qwest's systems and databases, which have plagued Touch America for the past two years.

Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶¶ 15-16 (rel. August 19, 1997) ("[w]e note that, in determining the extent to which BOC entry into the long distance market would further competition, we would find it more persuasive if parties presented specific information as to how such entry will bring the benefits of competition, including lower prices, to all segments of the long distance market.")

[24] *Id.* at ¶ 390.

[25] *New York Order* at 4164.

[26] *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Final Report on Qwest's Compliance with the Public Interest Requirement, Docket No. D2000.5.70 (July 8, 2002).

1. Similar to Touch America's billing problems, the filings of competitors in this proceeding are replete with examples of Qwest providing inaccurate and inadequate wholesale bills.

It is now undeniable that a BOC must demonstrate that it provides competitors with "complete, accurate, and timely wholesale bills" that provide competitors a meaningful opportunity to compete.[27] Further, the Department of Justice ("DoJ") has made clear that "[a]ccurate and auditable electronic bills are an important factor in making local telecommunications markets fully and irreversibly open to competition."[28] The initial comments demonstrate, however, that Qwest not only fails to provide auditable electronic bills which, in itself should compel denial of the Application,[29] but that its bills are replete with erroneous and unsupportable charges, thereby requiring CLECs to expend significant resources to reconcile and dispute the charges.

For example, WorldCom has found that "[t]he CRIS bills that Qwest has been providing . . . are entirely inadequate . . . [t]he bills lack detail information WorldCom needs to audit the

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[27] *See Application of Verizon New Jersey Inc. (d/b/a Verizon Long Distance) for Authorization to Provide In-Region InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189, ¶ 121 (rel. June 24, 2002).

[28] *In re: Application of Verizon Pennsylvania, Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Evaluation of the U.S. Department of Justice, FCC Docket No. 01-138 (July 26, 2001).

[29] Although Qwest introduced a proprietary, auditable electronic bill system on July 1, 2002, this system has not yet been independently tested and therefore cannot be relied upon by Qwest to meet its obligations to CLECs. *See* AT&T Comments at 45-46 (Qwest's use of non-industry-standard billing format renders CLECs unable to audit Qwest's wholesale bills, as it is prohibitively expensive and time-consuming to attempt to use paper bills to verify the accuracy of Qwest's bills). If the Commission were to grant Qwest's Application prior to ensuring the efficacy of the auditable electronic billing system, Qwest's "carrot" to ensure that the system works disappears and CLECs are left with a deficient billing system. Indeed, the DoJ noted that, when Verizon initiated its auditable electronic bill system several years ago, Verizon encountered numerous problems with its initial deployment. *See* DoJ Comments at 23, n. 106. CLECs operating in the Qwest region should not be required to work through these problems while Qwest is busy increasing its revenues through long distance service.

bills . . . ." [30] As a result of these billing deficiencies and the obvious lack of internal checks on Qwest bills, WorldCom already has been forced to open billing disputes with Qwest for hundreds of thousands of dollars.[31] Similarly, AT&T describes how "Qwest's wholesale bills to AT&T have persistently contained errors, most of which have continued to appear in AT&T's bills even after months of discussions between Qwest and AT&T."[32] AT&T has found that Qwest failed to return more than 40 percent of the DUFs (Daily Usage Files) that it was required to send and committed errors on more than 30 percent of the access DUFs that AT&T actually received.[33] As a result of Qwest's untimely and inaccurate DUFs, CLECs are unable to decipher and reconcile important data and usage information and are therefore precluded from providing effective customer care service and accurate end-user billing.

Eschelon Telecom also experiences the burden of Qwest's inadequate and anticompetitive billing practices.[34] Qwest fails to provide Eschelon circuit identification information or the date of the dispatch or trouble repair in Eschelon's maintenance and repair bills, thereby foreclosing Eschelon from auditing the bills for accuracy.[35] Qwest also fails to provide Eschelon customer loss information that accurately and clearly identifies which customers have left Eschelon for another carrier, thereby resulting in double billing of certain

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30 WorldCom Comments at 18.

31 *Id*.

32 *See* AT&T Comments at 44-46. For example, AT&T has found that Qwest's bills for its UNE-P offering contain long distance charges when the IXC is other than AT&T, fail to provide details of debit and/or credit adjustments at the account level, and fail to include an explanation or definition of special service charges. Qwest also bills long distance charges on an individual call basis, rather than on the appropriate minutes-of-use basis. *Id*.; Finnegan/Connolly/Menezes Declaration ¶¶ 219-220.

33 AT&T Comments at 45.

34 *See* Comments of Eschelon Telecom, Inc. at 14.

35 *Id*. at 14-15. Eschelon also notes that because Qwest's maintenance and repair bills contain charges going back several previous months,"[b]ill verification becomes virtually impossible." *Id*. at 14.

customers and the consequent loss of reputation and goodwill.[36] As a result of Qwest's inaccurate and untimely wholesale bills, Eschelon has more than $2.2 million in outstanding billing disputes with Qwest.[37]

These billing problems are not surprising to Touch America, as they are typical of those that Touch America has experienced over the past two years. Such problems should also come as no surprise to the Commission, as KPMG reported that it was unable to determine whether (1) Qwest has in place an internal process for validating bill accuracy; (2) Qwest complied with cycle-balancing procedures to resolve out-of-balance conditions or whether Qwest uses sufficient reasonability checks to identify errors not susceptible to pre-determined balancing procedures; (3) Qwest has procedures to ensure that payments and adjustments are applied when errors are identified; or (4) Qwest ensures that bills are retained for a sufficient length of time so that CLECs can challenge them.[38] Touch America can assure the Commission that, in its experience, Qwest lacks internal processes and will continue to render wholly inadequate and inaccurate wholesale bills.

Notwithstanding the foregoing, the DoJ somehow finds that, "on the whole," Qwest's wholesale billing meets the requirements for accuracy, as "billing accuracy does not seem to be a widespread problem."[39] But, in fact, given the limited number of competitors participating in this proceeding, three carriers with hundreds of thousands – or millions – of dollars in dispute should be considered a problem requiring immediate correction. Indeed, the reason billing disputes may not be more "widespread" is that Qwest entered into secret agreements with

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36 *Id*. at 17.
37 *Id.* at 22.
38 WorldCom Comments at 18-19.
39 DoJ Comments at 25, n. 116.

individual CLECs in which Qwest agreed to forgive the CLEC's outstanding bills in exchange for the CLEC's agreement not to oppose Qwest's 271 applications.

In short, the record demonstrates that Qwest fails to meet the Commission's requirement for "complete, accurate, and timely wholesale bills." As a result, the Application must be denied.

2. Consistent with Touch America's experience, Qwest is providing its competitors discriminatory and inadequate access to Qwest's databases and systems and frustrating competitors' efforts to obtain information necessary to serve customers.

The initial comments demonstrate that the problems experienced by Touch America in obtaining access to Qwest's databases and information are likewise being replicated in the local exchange marketplace. Similar to the manner in which Qwest refused to provide Touch America access to the information it needs to serve its customers, Qwest fails to provide CLECs with nondiscriminatory access to its LFACS system and all other databases that contain loop qualification information.[40] For example, the "loop qualification tools" that Qwest provides do not provide CLECs with all of the information to which Qwest has access.[41] As a result, Qwest fails to provide CLECs nondiscriminatory access to the loop qualification and loop make-up information that competitors need to offer their services.[42] Qwest, of course, provides itself with full access to loop qualification information, thereby providing itself an unlawful competitive edge.

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[40] *See* AT&T Comments at 39-40. As AT&T points out, when a BOC has compiled loop qualification information for itself, "it is required to provide requesting competitors with nondiscriminatory access to the loop information within the same period of time frame." *Id*. at 39 (citing *Georgia/Louisiana Order* at 9075).

[41] AT&T Comments at 39-40. *See also* Comments of Covad Communications Company at 13-16 (Qwest fails to demonstrate that it provides CLECs with nondiscriminatory access to all loop makeup information available in Qwest's databases and systems).

In addition, in much the same way that Qwest precludes integration among, and reasonable access to, the Qwest databases by Touch America, Qwest does not offer CLECs the ability to successfully integrate pre-ordering and ordering interfaces.[43] This lack of integration results in Qwest wrongfully rejecting a high percentage of CLEC orders, thereby requiring CLECs to incur the costs and expend the time to reconcile and resubmit its orders.[44] Qwest's refusal to provide CLECs with simple ordering processes and uniform business rules comports with Touch America's experience.

Further, the comments demonstrate that Qwest's order flow-through rate is abysmally low, requiring Qwest to manually process a substantial number of CLECs orders.[45] WorldCom reports that, even with the low volume of commercial orders, Qwest flowed through only 53% of UNE-P orders submitted via EDI.[46] AT&T computes that, depending on the type of order and the interface used, between 25 and 65 percent of all electronically submitted LSRs in Qwest's region are manually processed by Qwest.[47] Manual processes are more prone to "error," or at least designations of "error," thereby negatively impacting the provisioning of CLEC orders.[48] In Touch America's experience, the incorporation of the human element into the process permits

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42 AT&T Comments at 39-42.

43 *See* AT&T Comments at 39 (noting that Qwest presents no "real-world" evidence that CLECs using EDI have attained successful integration and that even the third-party tester (HP) confirms that a CLEC would find it unreasonably difficult, if not impossible, to integrate EDI pre-ordering and ordering functions successfully). *See also* WorldCom Comments at 6-9.

44 *See* WorldCom Comments at 7-8; AT&T Comments at 39-41.

45 *See* WorldCom Comments at 10-12; AT&T Comments at 40-42.

46 WorldCom Comments at 11. As WorldCom explains, "[u]nlike in other regions, Qwest does not have sufficient commercial experience to show that it can process orders manually without difficulty as ordering volumes increase significantly . . . [i]ndeed, Qwest has not even shown it can do so with low order volumes." *Id*.

47 AT&T Comments at 41.

48 *See id*. at 41 ("[m]anual processing, by nature, increases the likelihood of delays and errors in

Qwest the opportunity to make mischief by revising information at will, creating new rules of the game, and obfuscating explanations upon inquiry. Touch America finds it noteworthy that Qwest does not have any regularly reported commercial performance data on the accuracy of its manual order processing.[49]

Unable to ignore the substantial quantity of manually processed orders, the DoJ inexplicably suggests that "the quality of the manual handing is more important that the quantity."[50] Assuming, *arguendo*, that the DoJ's assumption is correct,[51] the "quality" of Qwest's manual processing – in terms of timing and accuracy – is also wholly substandard. Even in the test environment, KPMG continued to find errors in Qwest's processing of manual orders *after* Qwest had supposedly instituted employee training and monitoring to correct previously-revealed deficiencies. Notwithstanding KPMG's finding, Qwest declined to retest the accuracy of its manual processes, likely worried about what such results would reveal. Indeed, Qwest's manual handling of orders can only become worse in the future when the scalability of the process is tested by increased volumes of orders at the same time that Qwest is faced with implementing staff and training cost reductions.[52]

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provisioning.").

[49] *See* DoJ Comments at 19; WorldCom Comments at 11.

[50] DoJ Comments at 17.

[51] Touch America disagrees with the DoJ's assumption. By virtue of the fact that manual processing, by nature, requires human intervention and is therefore prone to human error, manual processes will always be subject to greater errors and delays and therefore negatively affect CLEC orders. The quantity of manually processed orders is therefore equally as important as the quality of the processing of such orders.

[52] *See, e.g.*, Written Consultation of the Idaho Public Utilities Commission ("Idaho Consultation") at 11 (expressing concern with the ability of Qwest to maintain Qwest's performance improvements in light of reductions in staff resulting from the current downturn in the technology area).

In sum, Touch America's "real life" experience with Qwest is indicative of the manner in which Qwest will conduct itself outside of the "test" environment. When Qwest is placed under the microscope – in the 271 test environment or in connection with the Commission's scrutiny of Qwest's merger with U S WEST and divestiture of its in-region, interLATA assets – Qwest will make any commitment to obtain the regulatory relief it seeks. When left to its own devices in the commercial marketplace, however, Qwest will turn a blind eye to its obligations and run roughshod over its competitors. The limited commercial activity in this proceeding makes clear that Qwest is on its way to repeating its pattern in the local exchange marketplace and must be stopped before the residents of the States of Colorado, Idaho, Iowa, Nebraska and North Dakota are denied the benefits of competition at all levels.

C. Qwest fails third-party testing of its OSS by failing to meet parity and "declining" to fully test its OSS after deficiencies were revealed.

Given the lack of any real commercial testing of Qwest's OSS and the fact that Qwest's third-party test results include the data of CLECs who entered into secret deals with Qwest, heightened scrutiny of the third-party tests is required.[53] As demonstrated by the initial comments, heightened scrutiny results in a finding of non-compliance, as Qwest, in certain material instances, either failed to meet parity or "declined" to retest its OSS subsequent to system and process modifications required when deficiencies were revealed.

Despite the fact that the parties agreed on "military-style" testing by the Regional Oversight Committee, which requires retesting until passed, Qwest failed to fully retest its performance in certain instances where the OSS testing revealed deficiencies. That is, in some

[53] *See, e.g.*, WorldCom Comments at 3 ("[b]ecause Qwest lacks such [commercial experience], the Commission should scrutinize the third-party test results very closely").

instances where deficiencies in Qwest's OSS were revealed by the test administrator, Qwest claimed that it implemented a modification to its systems or conducted staff training to remedy the deficiency, but then "declined" to retest to ensure that the system modification or training was properly implemented. As a result, there is no way to ensure the efficacy of Qwest's correction or, therefore, whether Qwest's OSS meets the requisite standard.

Notwithstanding the foregoing, the state commissions recommend approval of the Application. For instance, the Idaho Public Utilities Commission ("Idaho PUC") found the following deficiencies in Qwest's performance or the testing process, yet ultimately recommended approval of the Application:

- **Errors in Manual Order Processing**. The OSS testing revealed an unacceptably high level of human errors in the manual processing of orders. Although Qwest "implemented additional training and revised documentation to address this problem, the problems persisted in the limited retesting conducted after the fixes were implemented." Rather than retest in sufficient quantity until such time as Qwest met the performance metric, Qwest proposed additional monitoring and performance reporting in lieu of additional testing.[54]

- **Qwest Reported Performance Data**. When KPMG discovered problems with Qwest's underlying data for performance measurements, Qwest implemented changes to its procedures for recording the data. However, "Qwest elected not to conduct further testing, so KPMG was unable to determine whether these changes adequately addressed these issues."[55]

- **Provision of Dark Fiber and EELs**. In response to the exceptions raised with respect to Qwest's process of provisioning dark fiber and EELs, Qwest stated that it made a number of improvements to its documentation and procedures, and KPMG eventually found the process to be adequate. However, orders that were evaluated after the documentation had been updated revealed further process errors. Qwest responded that it would conduct additional training, but Qwest elected not to have the test vendors verify whether such training had resolved the problems.[56]

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54 Idaho Consultation at 6-7.
55 *Id.* at 7.
56 *Id*. at 8-9.

- **Disposition Codes for CLEC Trouble Reports**. The test results revealed inconsistencies in the codes entered in repair records by Qwest, which result in improper treatment of repair records in Qwest's performance reports. Qwest made certain improvements to the documented procedures for coding such reports, but the results still failed to reach a level deemed acceptable by KPMG. Qwest agreed to conduct additional training, but elected not to conduct further retesting.[57]

- **Production of DUF Reports**. Qwest failed numerous times to meet KPMG's criteria for the production of DUF reports and, in response, Qwest implemented system improvements and employee training, but did not retest.[58]

In sum, although Qwest is relying almost exclusively on third-party test results, it fails to meet the parity requirements and refuses to fully test key performance issues in the test environment. A finding of OSS operational readiness surely cannot follow.

D. The substantive and procedural infirmities surrounding the proceeding and Qwest's premature entry into the long distance market mandate denial of the Application.

More so than any other 271 application, the filings in this proceeding establish a litany of anticompetitive and wrongful activity by Qwest, much of which has the effect of silencing opposition or directly impacting the reliability of the record in the proceeding. Further, while Qwest was silencing its critics, it was also quietly engaging in the very conduct prohibited by the statute under which it now seeks relief. Taken, *in toto*, the only reasonable finding is that the Commission must deny the Application.

1. The record in the proceeding fails to fully reflect the concerns of competitors.

The lack of competitors filing initial comments in this proceeding may best illustrate the anticompetitive effects of the "secret" agreements that Qwest bargained for in exchange for this

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57 *Id.* at 10.
58 *Id*. at 11.

very silence.[59] Qwest's secret pacts call into question the reliability of the performance data relied upon by Qwest in this proceeding as well as the question of whether the record genuinely reflects competitors' experience in the Qwest region. As succinctly stated by AT&T, "Qwest's approach of 'buying off' CLECs that would otherwise have brought evidence of its failure to adhere to the Act's market opening requirements to the attention of regulators has subverted the entire section 271 process." [60] Even those parties that recommend approval of the Application cannot ignore Qwest's wrongful conduct, although they turn a blind eye to the appropriate remedy in an effort to permit the Application to proceed. For example, Commissioner Boyle of the Nebraska Public Service Commission, concurring with the Nebraska Commission's recommendation for approval, nevertheless found that, "[i]f there were such agreements which gave special treatment to a competitor or agreements which required a company to withdraw as a protestant in Qwest's 271 proceedings, the thoroughness of the process is questionable."[61]

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[59] Approximately 36 carriers filed initial comments in the New York 271 proceeding. In comparison, only approximately 12 competitors filed in this proceeding, although, according to its Wholesale Volumes Data Report Summary filed with its Application, even in the State of North Dakota, arguably the state with the least amount of competition, Qwest identifies 35 facilities-based CLECs to which it provides service. Although, given the low volume of commercial orders in the five-state region, many of these CLECs may not yet have submitted a significant number of orders with Qwest, they would certainly still have a substantial interest in ensuring that Qwest is required to meet its statutory obligations to its competitors.

[60] AT&T Comments at 6. *See also* Comments of the Iowa Office of Consumer Advocate ("Iowa OCA Comments") 11-12 (concluding that the broad reach of the public interest dictates that Qwest's conduct in this regard be considered by the Commission as reflecting adversely on its Application as valuable evidence from CLECs that deal with Qwest on a daily basis may not have been produced during the proceedings that Iowa and other Qwest states conducted); CompTel Comments at 13-15 (encouraging the Commission to examine Qwest's aggregate wholesale performance data excluding the data from CLECs with unfiled interconnection agreements, as those carriers may have received preferential treatment from Qwest and therefore skewed the aggregate performance results); WorldCom Comments at 4 (explaining that, although the impact from the unfiled CLEC agreements may have a significant impact on KPMG's analysis of the performance data, KPMG has not reviewed the secret agreements to ascertain the impact on their results).

[61] Concurring Statement of Commissioner Anne C. Boyle, Nebraska Public Service Commission ("Commissioner Boyle Opinion") at 2.

Likewise, the DoJ off-handedly dismissed the effects of the secret agreements on the record in this proceeding[62] yet ultimately states that, "[i]f the Commission finds that a violation has occurred, sanctions may be appropriate and could include suspension or revocation of any Section 271 authority that the Commission may have granted in the interim."[63] DoJ therefore recognizes the importance of the impact of any such violation but, like the state commissions, is not willing to take the position that the Application should be denied until this and other matters are resolved by the Commission.[64] Similar to the position of the state commissions, the DoJ implies that a two to three year process, in and of itself, somehow lends credibility to the Application.

Touch America respectfully disagrees with the DoJ's determination and considers the finding backwards. Although the process may have taken several years, competitors have been waiting *6* years for fair and open competition in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota. The existence of the secret agreements means that they will continue to wait. In Touch America's opinion, the DoJ should be more concerned with promoting true competition. Further, the existence of the secret agreements is beyond dispute and the Commission is therefore faced with a discrete, legal issue: whether the existence of the agreements violates the Act.[65] Requiring Qwest to refile its 271 application after the Commission renders a decision on the lawfulness of the secret agreements is not unreasonable and is in the best interests of competition. Trying to undo the approval of the Application at

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62 DoJ Comments at 5. The DoJ essentially relied on the finding of the Colorado Public Utility Commission despite the fact that the DoJ is charged with undertaking an "independent" evaluation of the record.

63 *Id*. at 3.

64 *Id*. at 5.

65 That is, whether Qwest was required to file the agreements with the state commissions pursuant

some later date is a much more unpalatable and unworkable solution and therefore is not highly likely to be the result even though, as the DoJ indicates, it could be the right result.

In addition to the impact of Qwest's secret pacts on the record in this proceeding, Touch America and AT&T have each been denied true *ex parte* meetings with the Commission. The Commission informed Touch America and AT&T that, as a result of Touch America's pending *Divestiture* and *IRU Complaints*, they would be required to permit Qwest to attend the *ex parte* meetings. In fact, not only was Qwest permitted to attend Touch America's meeting, but it was given equal time during the one-hour meeting to respond to Touch America's concerns. By requiring Touch America to permit Qwest to participate in Touch America's *ex parte* meeting, the Commission chilled the *ex parte* process, precluding Touch America from a frank discussion of the issues germane to the proceeding. The Commission's efforts to stifle Touch America are particularly troubling given the lack of participation in the proceeding by competitors due to the declining financial climate and the silence that Qwest bought with its secret pacts.

The existence of the secret agreements and the restricted *ex parte* process calls into question whether the record accurately and fully represents the interests of all parties. These substantive and procedural infirmities alone compel the denial of the Application.

2. Qwest has "jumped the gun" in providing 271 services.

The filings demonstrate that Qwest has done everything it could to sneak its way into the in-region, interLATA market prior to receiving authority to do so. Through its unlawful and anticompetitive actions, Qwest is trying to begin the long distance race half-way around the

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to sections 252(a) and (e) of the Act.

track. Qwest must not be permitted to "jump the gun," but must be made to come back to the starting gate.

The filings are chock full of illustrations of Qwest's efforts to wrongfully jump start its entry into the in-region, interLATA market. For instance, in anticipation of filing its 271 applications, Qwest informed its customers that it intended to use its customer's proprietary information for marketing purposes, but failed to make clear its intentions as well as the customers' opt-out alternatives.[66] Qwest, of course, planned to use its customer's information to give itself an early advantage in marketing to the long distance market. Only after severe criticism from a number of commissions, consumers, and customers, as well as the initiation of some state commission and attorney general investigations, did Qwest choose to withdraw its proposal.[67] As Commissioner Boyle from the Nebraska Public Service Commission indicates, this type of action "served as an alert to post-271 behavior."[68]

In a further effort to prematurely set itself up in long distance markets, Qwest implemented a local service freeze (*i.e.*, a "lock" on the customer's choice of local exchange carrier, intended for the purpose of combating slamming problems). Qwest initially defended its local freeze policy as a consumer protection initiative. However, it became clear under questioning that Qwest was solely intending to make it more difficult for customers to switch local service so that, when Qwest received 271 authority, it could swoop in and become the customer's full service provider. Consequently, the Iowa Utilities Board ordered Qwest to cease its practice of freezing local service changes and the Nebraska Public Service Commission

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66 *See* Commissioner Boyle Opinion at 1-2.
67 *Id.*
68 *Id*. at 1.

issued a moratorium on the use of such a freeze until Qwest provided evidence of the need for the freeze.[69] As described by AT&T, as a result of Qwest's local service freeze, customers were unable to switch to AT&T Broadband local service due to freezes on their accounts, even though the majority of customers asserted that they never authorized the freeze.[70] In the mind of at least one regulator, Qwest's actions "were aggressive preemptive strikes to place [Qwest] in a superior marketing position as soon as they received 271 approval."[71]

Not only is Qwest undertaking schemes designed to put itself in the cat-bird seat once it receives 271 authority, but the initial comments demonstrate that Qwest is already offering in-region, interLATA services in violation of Section 271. Touch America and others – including Qwest's own auditors – have demonstrated that Qwest has violated and continues to violate section 271 by selling what Qwest refers to as "lit capacity IRU" and other in-region, interLATA services.[72] In fact, as discussed *supra*, through its announcement yesterday as to the nature of its IRU sales, Qwest all but admits itself that it has been providing in-region, interLATA services for two years in the guise of "lit capacity IRUs."

As AT&T explains, subsequent to its merger with U S WEST and its purported divestiture of its in-region, interLATA assets to Touch America, Qwest undertook a concerted campaign to re-acquire the most valued divested customers and to provide them, and others, with prohibited, in-region, interLATA services.[73] This activity was confirmed by Arthur Andersen in its post-divestiture compliance reports, where it found that Qwest employed at least three separate unlawful schemes: (1) it has used the Qwest-coined term "lit capacity IRU," which is

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69 *Id*. at 2; AT&T Comments at 130.
70 AT&T Comments at 130.
71 *See* Commissioner Boyle Opinion at 2.
72 *See, e.g.,* AT&T Comments at 125-29, CompTel Comments at 7-12.

nothing more than in-region, interLATA telecommunications services as defined by the Act (*i.e.*, transmission service); (2) it has provided interLATA services to customers under the guise of "corporate communications;" and (3) it has directly provided interLATA services "billed and branded as Qwest services."[74] In fact, as demonstrated by CompTel, Arthur Andersen's most recent audit reveals that Qwest's provision of illegal in-region, interLATA services is actually increasing.[75]

Further, as set forth in Touch America's initial comments, Qwest directed and controlled the so-called "independent" compliance audit process, essentially making a mockery of the post-divestiture compliance audit. The fact that Arthur Andersen was Qwest's corporate auditor during the period of time that it was also charged with performing the post-divestiture compliance audits, by itself, calls into question the "independence" of the compliance audits.[76] The cozy nature of Qwest's and Arthur Andersen's relationship, such that Arthur Andersen routinely ran its reports by Qwest for review and comment before filing them with the Commission, wholly undermines any attempt to hold the audit out as "independent."[77] As a

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[73] AT&T Comments at 126-27.

[74] AT&T Comments at 126 (citing the Letter from Arthur Andersen LLP to Dorothy Attwood (June 6, 2001), Findings n. 2 and 7; Report of Independent Accounts, Att. 1 (April 16, 2001)). Qwest also attempts to hide its provision of prohibited in-region, interLATA services through the use of voice over Internet protocol and voice over asynchronous transfer mode technologies.

[75] *See* CompTel Comments at 10 (demonstrating that the 2002 Auditor's Report shows that the number of account records with in-region service component codes increased by almost 200 from 2001 and the in-region private line services billed and branded as Qwest services increased by 70 customers).

[76] As a result of its relationship with Qwest, Arthur Andersen approached the compliance audits as if Qwest, not the Commission, was its client.

[77] Arthur Andersen did little more than report the results of the tests conceived and executed entirely by Qwest, thereby wholly failing to conduct the independent investigation which it was charged to do by the Commission.

result of this tainted process, it is an acknowledgement of the significance of Qwest's 271 violations that Arthur Andersen even discovered and revealed the 271 violations.

In sum, given Qwest's anticompetitive and wrongful activities, and all of the allegations and accusations swirling around Qwest, the Commission must deny the Application. As found by the Iowa OCA, a Division of the Iowa Department of Justice, "Qwest's Consolidated Application is fraught with unanswered questions that should be addressed before granting it permission to enter the interLATA long distance market in Iowa."[78]

E. Contrary to the filings of the state commissions, post-271 monitoring of Qwest is insufficient given Qwest's proclivity to evade regulators and its statutory obligations.

While recognizing that Qwest has failed in certain instances to meet the required performance indicators, or acknowledging the host of allegations of Qwest's unlawful or anticompetitive conduct, the state commissions nevertheless recommend approval of Qwest's Application, subject to continued monitoring of Qwest's activities. Contrary to the position of the state commissions, given Qwest's history of circumventing the law, regulators and competitors, the Commission must not leave the future of local competition in these states to future enforcement. Instead, Qwest must be made to comply with Section 271 and other laws before being permitted to enter the in-region, interLATA market.

The recommendation of the state commissions to approve Qwest's Application is not surprising. The commissions have expended significant time and scarce resources over the past

[78] *See* Iowa OCA Comments at 11-12. The Iowa OCA also demonstrates that permitting Qwest into the long distance market will result in Qwest using its monopoly power in the local markets – through its name recognition and customer convenience of having one carrier for both local and long distance service – to extend that monopoly in the long distance market. Iowa OCA Comments at 5-10. As the Iowa OCA states, given the economic advantages that Qwest will have, the likely consequence will be that Qwest will soon monopolize the long distance market in Iowa and any benefits consumers might see as a result

several years to evaluate Qwest's compliance with Section 271[79] and therefore, understandably, do not want "last minute" revelations – such as the discovery of secret CLEC pacts, allegations of accounting irregularities, the initiation of criminal investigations and the introduction of deceptive consumer practices – to disturb their hard work. Accordingly, faced with Qwest's "suspect" activities and failure to meet performance metrics, the states either brush off the impact of Qwest's conduct[80] or find that continued monitoring will ensure that Qwest does not continue its anticompetitive and unlawful conduct.

For instance, while the Colorado PUC acknowledged that the record contained little evidence of a functional, flow-through capable Stand Alone Test Environment (SATE), it nevertheless found that the performance assurance plan "provides an adequate forward-looking incentive for Qwest to maintain a functional SATE."[81] The state regulators even extended this "continued enforcement" approach to dismiss Qwest's blatant anticompetitive conduct and the

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of competition will quickly disappear. *Id*. at 8.

[79] *See* Comments of Nebraska Public Service Commission at 1 (indicating that it had been evaluating Qwest's 271 application for 4 years); Evaluation of the Colorado Public Utilities Commission ("Colorado PUC Evaluation") at 1 ("[a]fter a rigorous and exhaustive two and one-half year evaluation …"); Idaho Consultation at 2 ("[t]he IPUC has been involved in a case for over two years to determine whether Qwest complies with the requirements of Section 271").

[80] *See* Colorado PUC Evaluation at 63-64 (in discussing the "secret" agreements between Qwest and its competitors, the Colorado PUC found that, in the absence of a dispositive finding from the Commission as to the legitimacy of the agreements, "[t]he sole remedy that the COPUC can impose is delay . . . [f]urther delay of a process that has been nearly three years in the making does little in the way of advancing consumer welfare").

[81] *Id*. at 51-52. Likewise, with respect to Qwest's ability to track information in the OSS as part of the change management process, where Qwest met the 100% benchmark in only 2 out of 6 months, the Colorado PUC found that, because Qwest had met the criteria in most of the recent months and because "there are meaningful penalties on a going-forward basis to give Qwest the incentive to comply, the finding is not sufficient to delay Qwest's entry into the interLATA market." *Id*. at 46-47. *See also* Idaho Consultation at 7 ("[t]he continued reliability of Qwest's performance reports is a significant concern, and one the IPUC expects to monitor closely") and at 8-10 (because reported results do not demonstrate parity performance for provisioning dark fiber and EELs, the Idaho PUC will continue to monitor Qwest's performance in these areas).

effect of Qwest's secret CLEC agreements. In addressing Qwest's unlawful efforts to "jump start" its entry into the long distance markets, Commissioner Boyle of the Nebraska Public Service Commission stated that the Commission's recommendation for approval "is forwarded with ongoing concerns regarding Qwest's commitment and willingness to cooperatively work to maintain existing markets as well as encourage additional markets . . . [and that] ongoing regional oversight is essential to maintain and improve competition."[82] In addition, the Iowa Utilities Board found that it could still recommend that Qwest had met the public interest requirement even in light of Qwest's "secret" CLEC agreements because it had separately ruled that Qwest would be subject to civil penalties for failing to file agreements in the future and "[t]he prospect of significant monetary penalties should act as a strong deterrent against future violations."[83]

While the state commissions are well-intentioned and skillful regulators, they do not have the resources to monitor, detect and deter Qwest's anticompetitive behavior. Qwest has repeatedly shown its adeptness at circumventing regulatory monitoring procedures. The Arthur Andersen audit was intended by the Commission to monitor Qwest's 271 activities and Qwest made a mockery of the audit process. Qwest is under civil and criminal investigation related to allegations that Qwest misstated its revenues for years without detection from federal regulators. Qwest was able to successfully conceal from regulators for years the secret agreements that it had entered into with competitors. Qwest has also been able to hide its 271-related activity, as well as its intention to continue its 271-prohibited activity post-divestiture, even when it was

82 *See* Commissioner Boyle Opinion at 1.
83 *See* Written Consultation and Evaluation of the Iowa Utilities Board at 67-68.

under the closest of scrutiny by the Commission in connection with its merger and post-merger compliance reviews.

The states themselves have acknowledged their limited resources – in terms of both money and staff – which is likely to prove inadequate to deter Qwest's future anticompetitive behavior.[84] Indeed, the North Dakota legislature, which meets only once every two years, has not yet passed legislation that will set up the funding the North Dakota Commission needs "to monitor Qwest's performance in the future to prevent backsliding and to ensure that the doors to competition remain open."[85] Moreover, Qwest would hardly be a willing participant in on-going regulatory oversight proceedings. Indeed, although certain states are promoting the establishment of a post-entry, regional collaborative enforcement effort, Qwest has not agreed to such a process, "suggesting they prefer to argue unresolved issues on a state-by-state basis."[86] It is no wonder, as state-specific monitoring would provide Qwest a greater opportunity to step up its anticompetitive conduct and continue its folly of doing as it wishes, when it wishes.

Continued monitoring is not the silver bullet to support approval of the Application. Qwest must be made to meet its obligations *before* it is permitted into the in-region, interLATA market, which it has clearly failed to do.

III. CONCLUSION

For the foregoing reasons, Qwest's Application must be denied. At a minimum, prior to permitting Qwest into the in-region, interLATA market, the Commission must require Qwest to

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84 *See* Concurring Opinion of Commissioner Susan E. Wefald of the North Dakota Public Service Commission at 1 (indicating that the North Dakota PSC has only 4 ½ people who take care of telecommunications issues, as well as electric issues, natural gas issues, and siting and consumer affairs matters).

85 *Id*.

86 *See* Commissioner Boyle Opinion at 2.

divest itself of the in-region, interLATA assets that it was supposed to have divested to Touch America several years ago. In addition, given Qwest's history of circumventing the divestiture process, the Commission must require Qwest to submit to a genuinely independent and comprehensive audit for the purpose of ensuring that Qwest rightfully divests itself of its in-region, interLATA assets. In light of Qwest's predilection of backsliding on its promises and commitments, the Commission must also establish an effective enforcement team charged with ensuring that any post-271 complaints are resolved quickly and fairly by the Commission. For example, given that the record has revealed a number of billing disputes, the Commission should have a process in place to ensure that billing disputes may be quickly resolved and that Qwest is precluded from terminating service to carriers that properly dispute Qwest's erroneous and inadequate bills. In sum, Qwest should be reined in and brought back to the starting gate before being permitted to provide in-region, long distance services in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota while, at the same time, its markets should be made fully open to competition.

Respectfully submitted,

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July 29, 2002